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No. 28

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1921

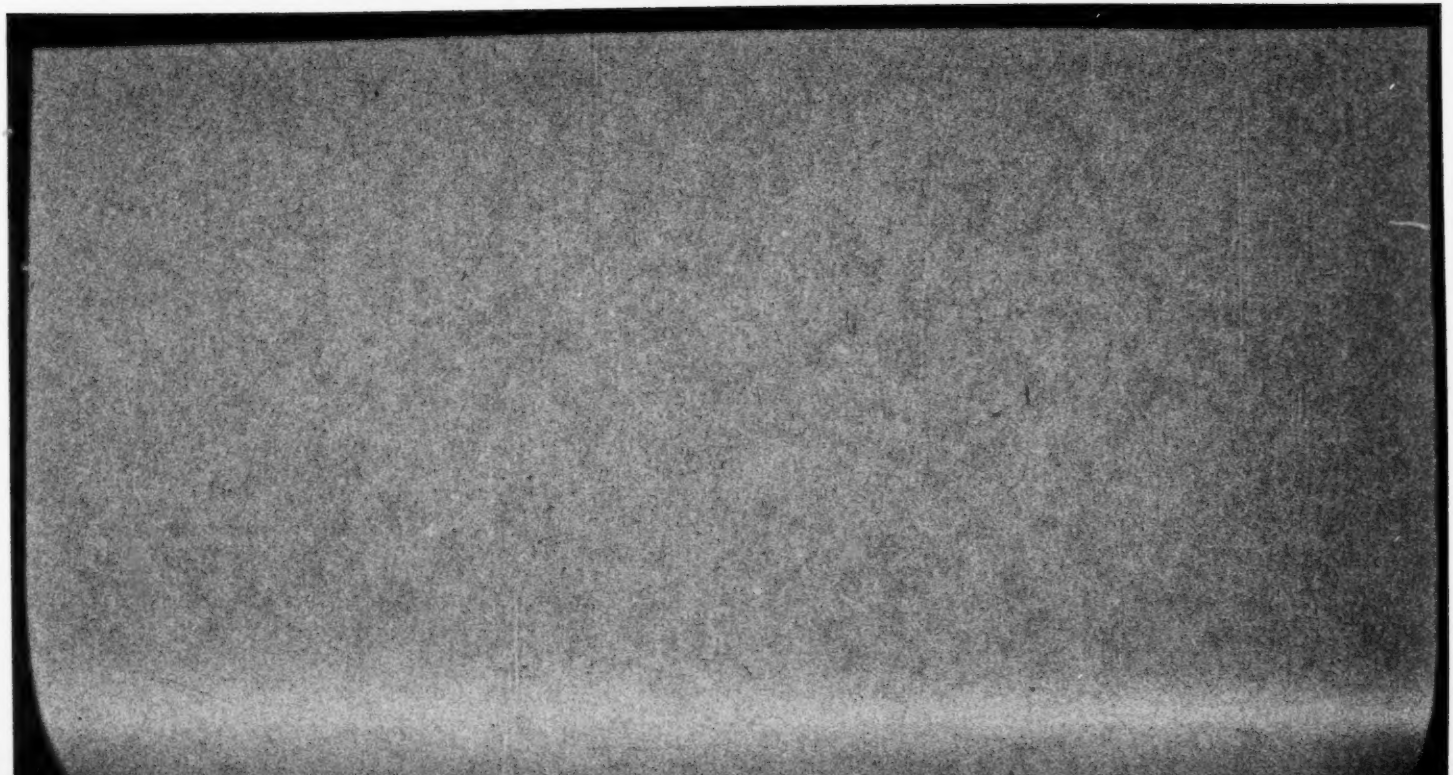
WESTERN FUEL COMPANY
(a corporation),
Petitioner,

vs.

ANTONE GARCIA, as administrator of the estate of Manuel Souza, deceased,
Respondent,
(Libelant Below).

BRIEF FOR RESPONDENT (Libelant below).

CHRISTOPHER M. BRADLEY,
HENRY HEIDELBERG,
Proctors for Respondent.



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BRIEF FOR RESPONDENT (Libelant below).

Statement of Facts.

Manuel Souza, a citizen of the State of California, while at work as a stevedore unloading coal from the Steamer "Tancred", anchored in Oakland Creek alongside the wharf of the Western Fuel Company, was killed August 5th, 1916, by reason of a large quantity of coal being negligently dumped

upon him from a bucket at a great height into the hold of the ship where he was working.

On August 24th, 1916, the widow of Manuel Souza made application for the payment of compensation to her by the appellant under the terms of the Workmen's Compensation, Insurance and Safety Act of California, Chapter 176, Laws of 1913. This application was filed on behalf of herself and five minor children of tender age, one being a posthumous child. An award was made in her favor by the State Industrial Accident Commission, and *this award was paid in installments by the Western Fuel Company for a period of one year and one day, or until the 6th day of August, 1917,* when the appellant had the aforesaid award annulled by the Supreme Court of California on the ground that the State Industrial Accident Commission had no jurisdiction in view of the decision of this court in the case of *Southern Pacific Company v. Jensen,* 244 U. S. 207, *decided May 21st, 1917.*

Thereafter, and on August 21st, 1917, a libel was commenced for wrongful death in the District Court of the United States for the Northern District of California, Southern Division. The widow and five children were awarded judgment against the Western Fuel Company for the sum of $10,000, less $494.00, which had been theretofore paid, as aforesaid.

The District Court made the following findings upon the trial of the case:

1. The death of Souza was due to the negligence of Hayes in withdrawing the bucket from the hopper before it was fully dumped and to the negligence of the hatch-tender in not giving warning to those in the hold.

2. The deceased was not guilty of contributory negligence in being where he was, as there was coal there to be discharged and he was preparing to discharge it.

3. Nor did the risk of his employment include the dumping of the quantity of coal that fell through the hatch at the time of the accident, even though it be conceded that he assumed the ordinary risk of his employment due to the occasional falling of a lump of coal.

The Western Fuel Company appealed to the Circuit Court of Appeals for the Ninth Circuit. That court on the 3rd day of February, 1919, affirmed the judgment of the lower court.

Thereafter the Western Fuel Company petitioned the said Circuit Court for a rehearing of the above entitled case, which was granted, and the Circuit Court of Appeals on the 6th day of October, 1919, reversed its former finding and held that the widow and children were without remedy, basing their decision upon the case of *Southern Pacific Company v. Jensen, supra.*

On the 30th day of October, 1919, the said Circuit Court granted a petition for further rehearing filed by proctors for Antone Garcia, etc., vacated their former judgment of reversal, and certified the case to this court for the answering of the three questions now before this court, argument

upon which was had before this court on the 18th day of March, 1921.

Proctors for the Western Fuel Company had theretofore, and on the 9th day of February, 1920, filed a petition to the Supreme Court of the United States for a *writ of certiorari*. This petition was denied.

After the argument before this court, on the 18th day of March, 1921, this court granted a *writ of certiorari* and asked that the entire record in this case be certified, presumably so that the entire facts in controversy might be before the court.

We will show that the Circuit Court of Appeals, in reversing their former affirmation of the decision of the lower court, which reversal they based entirely upon *Southern Pacific Company v. Jensen*, was erroneous, as we will show that the case of *Southern Pacific Company v. Jensen* has no application whatever to this case.

Respondent's Position as to the Law Applicable in This Case.

For purposes of argument, we may concede that a remedy at common law and in admiralty has always existed for a tort not resulting in death, and it might be that if suit is brought by libel proceedings in admiralty for personal injuries not resulting in death, admiralty law analogous to common law should be applied. This might be so

because the existence of a state law is unnecessary. The remedy exists and has always existed, by reason of the common law, and no state law is brought before the court.

It, of course, will be admitted that there is no recovery for wrongful death at common law or in admiralty, unless given by a state statute. Therefore, when suit is brought by libel proceedings for the recovery of damages for wrongful death, such proceedings can be maintained only because of the existence of a state statute (in this instance Sec. 1970 Civil Code of California), and the recovery should be in accordance with the substantive law laid down in that statute.

It is our contention that Section 1970 of the Civil Code of the State of California warrants recovery in this case, and said section is full and complete in its terms and any recovery based upon such statute should be entirely in accordance therewith.

It will be noticed that this statute grants a right of recovery to the representative of the deceased man acting on behalf of the widow and orphans where the deceased was in the employ of the master at the time of his death. We contend that the modifications of the fellow-servant law in favor of respondent should be applied. That we concede, as we do, that wherever the state law conflicts with the "characteristic" features of admiralty law, the state law must give way in favor of admiralty law, in no measure militates against our contention.

It is our contention that Section 1970 of the Civil Code, and its modifications of the fellow-servant law, violates no "characteristic" features of admiralty law, for the reason that it is in relation to recovery for wrongful death, and that there was no common law or admiralty law upon that subject.

We claim that the rule of laches should be applied as the law of limitations of actions in this case, for the reason that admiralty has as one of its "characteristics" the law of laches, which is the law of that *forum*.

We know of no better way to discuss the matter before the court than to take up in the order named the questions certified to this court. The first question is:

"ARE THE STATUTES OF THE STATE OF CALIFORNIA COVERING THE RIGHT OF ACTION FOR WRONGFUL DEATH TO BE APPLIED IN LIBELS IN ADMIRALTY FOR WRONGFUL DEATH?"

We will not consume much space in argument of this question, as it has been admitted by our opponents that that question should be answered in the affirmative (see p. 7 of Brief for Western Fuel Company, filed on the 17th day of March, 1921). That this is so is borne out by

Deslions v. La Compagnie, Gen. Trans., 210 U. S. 95; 52 L. Ed. 973;

The Hamilton, 207 U. S. 398; 52 L. Ed. 264;

Monongahela River, etc., v. Schinnerer, 196 Fed. 1019;
Maryland v. Miller, 194 Fed. 775;
Atlantic Transport Co. v. Maryland, 193 Fed. 1019;
Aurora Shipping Co. v. Boyce, 191 Fed. 960;
Trauffler v. Detroit, 181 Fed. 256.

Question two is as follows:

"IF THE STATE STATUTES DO APPLY ARE THEY TO BE APPLIED WITH ALL THEIR INCIDENTS ABOLISHING OR MODIFYING THE COMMON LAW DEFENSES OF ASSUMPTION OF RISK, CONTRIBUTORY NEGLIGENCE AND THE NEGLIGENCE OF A FELLOW SERVANT?"

Owing to the findings of the District Court, which have been affirmed twice by the Circuit Court of Appeals, we will not argue the questions of contributory negligence or the assumption of risk, for the reason that the findings themselves expressly state that the facts of this case show that there was no contributory negligence on the part of the deceased, nor was there any assumption of risk on his part.

As we have previously stated, the widow and children in this action base their right of recovery entirely upon Section 1970 of the Civil Code of the State of California, which is as follows:

"Sec. 1970. When employer not bound to indemnify employee.

An employer is not bound to indemnify his employee for losses suffered by the latter in consequence of the ordinary risks of the business in which he is employed, nor in consequence of the negligence of another person employed by the same employer in the same general business, unless the negligence causing the injury was committed in the performance of a duty the employer owes by law to the employee, or unless the employer has neglected to use ordinary care in the selection of the culpable employee; *provided, nevertheless, that the employer shall be liable for such injury when the same results from the wrongful act, neglect or default of any agent or officer of such employer, superior to the employee injured, or of a person employed by such employer having the right to control or direct the services of such employee injured, and also when such injury results from the wrongful act, neglect or default of a co-employee engaged* in another department of labor from that of the employee injured, or employed *upon a machine,* railroad train, switch-signal point, locomotive-engine, *or other appliance than that upon which the employee is injured is employed,* or who is charged with dispatching trains, or transmitting telegraphic or telephonic orders upon any railroad, or in the operation of any mine, factory, machine-shop, or other industrial establishment.

Knowledge by an employee injured of the defective or unsafe character or condition of any machinery, ways, appliances or structures of such employer shall not be a bar to recovery for any injury or death caused thereby, unless it shall also appear that such employee fully understood, comprehended and appreciated the dangers incident to the use of such defective machinery, ways, appliances or structures, and

thereafter consented to use the same, or continued in the use thereof.

When death, whether instantaneous or otherwise, results from an injury to an employee received as aforesaid, the personal representative of such employee shall have a right of action therefor against such employer, and may recover damages in respect thereof, for and on behalf, and for the benefit of the widow, children, dependent parents, and dependent brothers and sisters, in order of precedence as herein stated, but no more than one action shall be brought for such recovery.

Any contract or agreement, express or implied, made by any such employee to waive the benefits of this section, or any part thereof, shall be null and void, and this section shall not be construed to deprive any such employee or his personal representative, of any right or remedy to which he is now entitled under the laws of this state.

The rules and principles of law as to contributory negligence which apply to other cases shall apply to cases arising under this section, except in so far as the same are herein modified or changed."

The court will readily see that this is a complete law in itself, applicable to the facts and circumstances of this case, and the court will also see that the doctrine of fellow-servant negligence, contributory negligence and assumption of risk have not been abrogated in California by this statute, but have simply been modified. *The court will also observe that there is no time limitation expressed in the statute itself.*

Courts of admiralty, having no law of their own for recovery in wrongful death cases, have heretofore held that recovery in such cases should be in accordance with state statutes, going so far in the following cases as to hold

> *"that where contributory negligence bars recovery under state statute that contributory negligence, if any, will bar recovery in the admiralty courts where the action is brought by virtue of a state statute".*
>
> *Cornell Steamboat Co. v. Fallon,* 179 Fed. 283;
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> *Gretschmann v. Fix,* 189 Fed. 716;
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> *Robinson v. Detroit, etc.,* 73 Fed. 883;
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> *Stern v. La Compagnie, etc.,* 110 Fed.;
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> *Monongahela River, etc. v. Schinnerer,* 196 Fed. 375;
>
> *A. W. Thompson,* 35 Fed. 115.

This is in disregard of the general admiralty rule of comparative negligence.

The *Monongahela* case contains the following quotation from *Ex-parte McNiel,* 13 Wall. 236-242; 20 L. Ed. 624:

> "A state law cannot give jurisdiction to any federal court; but that is not a question in this case. A state law may give a substantial right of such a character that, where there is no impediment arising from the residence of the parties, the right may be enforced in the proper federal tribunal, whether it be a court of equity, *of admiralty,* or of common law. The statute in such cases does not confer the jurisdiction. That exists already and it is invoked to give effect to the right by applying

> the appropriate remedy. This principle may be laid down as axiomatic in our national jurisprudence. *A party forfeits nothing by going into a federal tribunal. Jurisdiction having attached, his case is tried there upon the same principles, and its determination is governed by the same considerations as if it had been brought in the proper state tribunal of the same locality. In no class of cases has the application of this principle been sustained by this court more frequently than in those of admiralty and maritime jurisdiction.*" (Italics ours.)

Also, in the case of *Quinette v. Bisso et al.*, 136 Fed. 825, the question of what state laws would be given effect in admiralty in a case of wrongful death was passed on, and the law of the case is stated in the syllabus:

> "An action in admiralty for wrongful death, based on Civ. Code L. Art. 2315, is governed by the local law with respect to the defense of contributory negligence."

Further:

> "A federal court, in administering a state statute giving a right of recovery for wrongful death will follow the decisions of the highest court of the state with respect to the measure of damages."
>
> COURT. "Without this statute the libelant could not maintain her libel. The statute must be applied in admiralty just as if the suit had been brought in the state courts, and any defenses which are open to the defendant under the jurisdiction of the state, if successfully maintained, will bar recovery under the libel."

Judge Brown, in *The City of Norwalk,* 55 Fed. 98, has taken up the questions involved in question two, and has written an exhaustive opinion thereon. That case was affirmed in 61 Fed. 364, and the Circuit Court of Appeals commented upon the excellence of the opinion written by Judge Brown.

Because of the completeness of the decision in the above case and because of its analogy to the questions herein involved, we insert the following excerpts from *The City of Norwalk,* 55 Fed. 98:

The administratrix sued by libel to recover damages for death of her husband, who lost his life through collision between a tug and The City of Norwalk. The accident happened in the channel between Blackwell's Island and Long Island shore, within the State of New York.

The court says in paragraph 3, page 102, in regard to the application of state laws in regard to the defense of contributory negligence:

> "The right of action conferred by statute is upon condition that the deceased, if living, might himself have maintained an action for his damages. By the law of this state the plaintiff's contributory negligence bars his recovery; and such contributory negligence, if found, must therefore, bar any recovery by the administratrix in an action in this court based upon the state statute. The Harrisburg, 119 U. S. 199, 214; 7 Sup. Ct. Rep. 140; The A. W. Thompson, 39 Fed. 115."

However, the court found against the defense of contributory negligence, under all the facts.

Paragraph 4, page 103:

> "It is further contended that there can be no recovery for loss of life in this court, because there is no liability therefor under the general maritime law of this country (citing cases), and because, as it is said, it is not competent for state legislation, (1) to change the law in maritime cases, or (2) to extend the jurisdiction of a court of admiralty so as to authorize it to enforce a new and purely statutory cause of action."

The court then comments upon the importance of the question, and first reviews the early cases holding that libels *in rem* will not be enforced, and then, in the next paragraph cites the more modern cases, "in which the validity of such state statutes and the jurisdiction of a court of admiralty to enforce them *in personam* have been considered and upheld" (citing cases, page 103).

After citing other cases to the same effect as aforesaid, the court says, on page 104:

> "And in the Supreme Court, although the question has been several times referred to, without adjudication, yet in the last case on the general subject (The Corsair, 145 U. S. 335, 347; 12 Sup. Ct. Rep. 949), both the validity of such state legislation and the jurisdiction of the state courts to enforce it by libel in personam seem directly affirmed. Mr. Justice Brown, in delivering the opinion of the court, says:
>
> "'If it (the local law) merely gives a right of action of a maritime nature, the District Court may administer the law by proceedings *in personam*.' Page 347, 145 U. S., and page 952, 12 Sup. Ct. Rep."

The court on page 104 continues:

"But the validity of judgments giving damages in the state courts in such cases and the validity of the statutes on which they were founded, have been twice directly and expressly adjudged: First, in Steamboat Co. v. Chase, 16 Wall. 522, and afterwards in Sherlock v. Alling, 93 U. S. 99. These suits arose on writs of error to judgments in the state courts of Rhode Island and Indiana for deaths in collision cases like the present, based upon similar statutes of those states. In the former case, the validity of the act was attacked as an encroachment on the admiralty and maritime power of congress; in the latter, as an encroachment on the commercial power. In both cases the validity of the statutes was upheld. In the latter, the careful opinion delivered by Mr. Justice Field contains what seems to me a full answer to all objections against the authority of the states to pass statutes of this character. He says:

" 'The act "only declares a general principle respecting the liability of all persons within the jurisdiction of the state for torts resulting in the death of the parties injured. And in the application of the principle it makes no difference where the injury complained of occurred in the state, whether on land or on water. General legislation of this kind, prescribing the liabilities or duties of citizens of a state, without distinction as to pursuit or calling, is not open to any valid objection because it may affect persons engaged in foreign or interstate commerce. Objection might with equal propriety be urged against legislation prescribing the form in which contracts shall be authenticated, or property descend or be distributed on the death of its owner, because applicable to the contracts or estates of persons engaged in such commerce * * *. But

with reference to a great variety of matters touching the rights and liabilities of persons engaged in commerce, either as owners or navigators of vessels *the laws of congress are silent, and the laws of the state govern. The rules for the acquisition of property by persons engaged in navigation, and for its transfer and descent, are, with some exceptions, those prescribed by the state to which the vessels belong; and it may be said, generally, that the legislation of a state, not directed against commerce or any of its regulations, but relating to the rights, duties and liabilities of citizens, and only indirectly and remotely affecting the operations of commerce, is of obligatory force upon citizens within its territorial jurisdiction, whether on land or water, or engaged in commerce, foreign or interstate, or in any other pursuit.* In our judgment, *the statute of Indiana falls under this class.* Until congress, therefore, makes some regulation touching the liability of the parties injured, *we are of opinion that the statute of Indiana applies, giving a right of action in such cases to the personal representatives of the deceased;* and that, as thus applied, it constitutes no encroachment upon the commercial power of congress".' Pages 103-104.

"Aside from the grant of power to regulate foreign and interstate commerce, the Constitution, it must be remembered, contains no direct grant to congress of legislative power over the maritime law. Its authority upon that subject, over and above the power derived from the commercial clause, though no doubt now firmly established (Butler v. Steamship Co., 130 U. S. 527, 9 Sup. Ct. Rep. 612; In re Garnett, 141 U. S. 1, 14, 11 Sup. Ct. Rep. 840) rests upon implication only.

"The grounds of this implication, briefly stated, are that the Constitution, in extending

the judicial power to all cases of maritime jurisdiction, presupposes a certain body of maritime law as its necessary attendant; that this law is not only a matter of interstate and international concern, but requires, also, harmony and consistency in its administration, and hence cannot be subject to defeat or impairment by liability to the diverse legislation of numerous states; and that it cannot be supposed that the states, in parting with all control over the judicial administration of maritime causes, intended to reserve to themselves a general legislative power over the same subject; and that congress must, therefore, be the only body competent to make any needed changes in the general rules of the maritime law.

"*This view, however, does not exclude state legislation upon matters of merely local concern, which can be much better cared for under state authority, and which have always been thus cared for; nor does it exclude general legislation by the states, applicable alike on land and water, in their exercise of the police power for the preservation of life and health, though incidently affecting maritime affairs;* provided that such legislation does not contravene any acts of congress, nor work any prejudice to the characteristic features of the maritime law, nor interfere with its proper harmony and uniformity in its international and interstate relations. The long established doctrine in the supreme court has been that in this field of 'border legislation', state laws are valid until congress interposes, and thereby excludes further state legislation. The Lottawanna, 21 Wall. 558, 581; Cooley v. Port Wardens, 12 How. 299; County of Mobile v. Kimball, 102 U. S. 691, 697-699; Bowman v. Railroad Co., 125 U. S. 507, 8 Sup. Ct. Rep. 689, 1062; Leisy v. Hardin, 135 U. S. 100, 120-122, 10 Sup. Ct. Rep. 681; Manchester v. Massachusetts, 139

U. S. 240, 266, 11 Sup. Ct. Rep. 559; Ficklen v. Taxing District, 145 U. S. 1, 12 Sup. Ct. Rep. 810. There is no reason why local state legislation should be deemed any more restricted by the *implied* power of congress over maritime legislation, than it is by the *express* grant of the *commercial* power. That the rule should be the same on each subject was intimated by Chief Justice Marshall in U. S. v. Bevans, 3 Wheat. 385, and by Mr. Justice Curtis in Smith v. State of Maryland, 18 How. 71, 76. The subject has been but little discussed, as compared with the frequent review of the commercial power of congress and its limitations.

"The instances, however, in which *new legal rights* created by state authority in maritime affairs, have been recognized and enforced, are numerous and diverse. They embrace—First, liens for supplies to domestic vessels (The Lottawanna, 21 Wall. 558); second, liens for master's wages (The Mary Gratwick, 2 Sawy. 342, affirmed by Mr. Justice Field; The Louis Olsen, 52 Fed. Rep. 652; The J. E. Rumbell, (March 6, 1893) 13 Sup. Ct. Rep. 498); third, liens for damages for refusing to load under a charter (The J. F. Earner, 22 Fed. Rep. 342, by Mr. Justice Brown); fourth, liens for double wharfage, (The Virginia Rulon, 13 Blatchf. 519); fifth, actions for half pilotage where a pilot's services were refused (Ex parte McNiel, 13 Wall. 236, and Ex parte Hagar, 104 U. S. 520, re-affirming Cooley v. Port Wardens, supra); sixth, liens for expenses of seamen at a quarantine hospital (The Wensleydale, 41 Fed. Rep. 829); seventh, regulations as to rivers, harbors, and wharves (County of Mobile v. Kimball, supra; Escanaba & L. M. Transp. Co. v. Chicago, 107 U. S. 678, 2 Sup. Ct. Rep. 185; Transportation Co. v. Parkersburg, 107 U. S. 691, 701-704, 2 Sup. Ct. Rep. 732; Packet Co. v. Keokuk, 95 U. S. 80; Packet

Co. v. Aiken, 121 U. S. 444, 7 Sup. Ct. Rep. 907; Steamship Co. v. Pennsylvania, 122 U. S. 326, 346, 7 Sup. Ct. Rep. 1118; eighth, penalties imposed for the protection of fisheries (Manchester v. Massachusetts, supra; Smith v. State of Maryland, 18 How. 71); ninth, quarantine laws (Morgan's L. & T. R. & S. S. Co. v. Louisiana Board of Health, 118 U. S. 455, 6 Sup. Ct. Rep. 1114); tenth, regulating the charges of floating elevators (Budd v. New York, 143 U. S. 517, 12 Sup. Ct. Rep. 468); eleventh, establishing and regulating ferries (Gibbons v. Ogden, 9 Wheat. 1, 203; Conway v. Taylor, 1 Black, 603; Wiggins Ferry Co. v. City of East St. Louis, 107 U. S. 365, 2 Sup. Ct. Rep. 257; Gloucester Ferry Co. v. Pennsylvania, 114 U. S. 196, 204, 214-217, 5 Sup. Ct. Rep. 826).

"Besides these new rights created, of so diverse a character, there are many other local regulations established under state authority, concerning the navigation of rivers and harbors, anchorage grounds, port wardens, navigation about piers and slips, and wharf and ferry privileges, which give birth to many specific rights that are constantly recognized and enforced in the trial of admiralty causes. These acts rest either upon the police power of the states, or on the local nature of the subject, and the absence of any legislation by congress on the same matter. Gloucester Ferry Co. v. Pennsylvania, supra. They show that over quite a wide range of local interests, state legislation is competent to deal with purely maritime subjects, and to create rights and duties which must be recognized in admiralty causes, though they may not change any of the characteristic principles of the maritime law.

"*Still further, it must be borne in mind that the maritime law is not in itself a complete and perfect system.* In all maritime courts there

is a considerable body of municipal law that underlies the maritime as the basis of its administration. *Strictly speaking, the maritime law is that alone which is peculiar to, or which specially concerns, maritime transactions. The general body of the law as regards the ordinary, fundamental rights of persons and property, whether on land or sea, is, as observed by Mr. Justice Field in the passage above quoted, derived from the constituted order of the state, i. e. from the municipal law,* which courts of admiralty to a considerable extent must necessarily adopt and follow, subject only to the modifications which the special characteristics of the law of the sea impose on maritime subjects. *The general rights and regulations of persons and property are subject to the control of the state and may be changed as the state sees fit, if they are not regulated by congress and do not trench upon its exclusive authority.* The administration of the law in the maritime courts of different countries, therefore, though it might be the same in all that is peculiar to the maritime law, might in other respects differ widely, through the differences in the municipal law which in part enters into the adjudication of maritime causes.

"It was upon the recognition of this principle alone, as I understand, that in the case of The Harrisburg, 119 U. S. 199, 213, 7 Sup. Ct. Rep. 140, it was decided that no action could be maintained in a court of admiralty of this country for loss of life, aside from statutory authority; namely, because there is no rule on this subject belonging specially to the maritime law as such. 'It (the maritime law) leaves the matter untouched.' Page 213, 119 U. S., and page 146, 7 Sup. Ct. Rep. And since the maritime courts in each country follow their own municipal law as regards giving damages for death; and inasmuch as by the common

law of this country such a cause of action does not survive,—the latter rule must, therefore, obtain in our courts of admiralty. In other words, it is the municipal law that on such a point determines the law applicable in a court of admiralty.

"There seem, therefore, to be at least three classes of subjects (none of them affecting, however, what is peculiar to the general maritime law, or touching its international or interstate relations), in which state legislation is competent to affect the rights of parties in courts of admiralty, in the absence of legislation by congress, viz.: (1) In the establishment of the general rights of persons and property within the state limits; (2) in the exercise of the police power; (3) in certain local regulations of a maritime nature.

"*The statute of this state which authorizes a recovery of 'the pecuniary damages', 'in behalf of a widow, husband, children or next of kin', falls within each of the above classes.* (1) *It is a general law of personal rights, not specially directed to commerce or navigation, but applying alike on sea or shore;* (2) *it is within the police power; for it is a 'statute intended to protect life.'* (Huntington v. Attrill, 146 U. S. 657, 675, 13 Sup. Ct. Rep. 224) through one of the most effectual of all sanctions, viz., by imposing on the offender a liability to pay a pecuniary indemnity; while in the interest of the public, it also tends to avert the dependency or pauperism of the survivors by shifting the burden of their support, in part at least, from the community to the authors of the wrong; (3) *it is local in its scope and interferes in no way with any needful uniformity in the general law of the seas, or with international or interstate interests.* Its validity, therefore, as applied to maritime affairs within the state limits, seems to me clear."

The above case was appealed to the Circuit Court of Appeals, Second Circuit, and after reviewing the facts, Judge Lacombe, Circuit Judge, says on page 367, 61 Fed.:

> "The case of the administratrix against the owners of the two vessels presents some further questions. It is contended that a libel *in personam* for damages for loss of life under the statute cannot be maintained in admiralty. *This objection has been most exhaustingly discussed by the learned district judge,* and all the authorities bearing upon it stated and analyzed. *There is nothing to add to his disposition of the question except to say that we fully concur therein.*"

The judgment of the court below, however, was modified by the Circuit Court of Appeals to the extent that the upper court did not concur in the decision of the lower court on the branch of the case having to do with the defense by the Norwalk Steamboat Company that the death was caused by the negligence of a fellow servant, reversing that part of the decree which dismissed the libel against the Norwalk Steamboat Company, remanding the case with instructions to decree against that company for an additional one-half the statutory damages.

THE MODIFICATIONS OF THE FELLOW SERVANT RULE, AS LAID DOWN IN SEC. 1970 OF THE CIVIL CODE AND AS ADJUDICATED BY THE SUPREME COURT OF THE STATE OF CALIFORNIA, SHOULD BE FOLLOWED BY ALL FEDERAL COURTS.

"Sec. 721. Rev. Stats. U. S.—the laws of the several states, except where the constitu-

tion, treaties or statutes of the United States otherwise require or provide, shall be regarded as rules of decisions in trials at common law, in the courts of the United States where they apply."

B. & O. v. Baugh, 149 U. S. 368 (cited in S. P. Co. v. Jensen, page 542);
Elliott v. Felton, 119 Fed. 270.

This, of course, has been reiterated time without number by this court, and especially where the question involved was a modification of the fellow servant doctrine.

Questions as to liability of master for injuries to his servants caused by negligent acts of fellow servants, is a matter which state legislatures may regulate.

L. & N. R. Co. v. Mellon, 218 U. S. 36; 30 S. Ct. 676; 54 L. ed. 921;
Mobile etc. R. Co. v. Turnipseed, 219 U. S. 35; 31 S. Ct. 136; 55 L. ed. 78.

When the subject is regulated by state statute, decisions of highest courts of state on questions arising thereunder are controlling upon federal courts.

Oakes v. Mase, 165 U. S. 363; 17 S. Ct. 345;
Proctor & Gamble v. Williams, 183 Fed. 695.

The above rule has been specifically applied to the question of what classes are within operation of statutes modifying the fellow servant rule.

Nor. Pac. R. Co. v. Hambly, 154 U. S. 349; 38 L. ed. 1009;
Kibbe v. Stevenson Iron Co., 136 Fed. 147;

U. S. Leather Co. v. Howell, 151 Fed. 444;
Atlantic etc. Co. v. Farmer, 176 Fed. 692.

California courts have construed Sec. 1970, Civil Code, with regard to the winchman and hatchtender:

(a) Hayes, the engineer or winchman, was at work on shore on an appliance other than that upon which Souza was working and therefore his negligence, which was really the cause of the accident, was the negligence of the employer.

Sec. 1970, Civil Code of California;
Korander v. Penn. Bridge Co., 16 Cal. App. 249.

(b) The negligence of the hatchtender, or foreman, is the negligence of the employer.

Sec. 1970, Civil Code of California;
Brown v. Sennett, 68 Cal. 225;
Foutz v. City of Los Angeles, 167 Cal. 487.

(c) Though it be held by this court, contrary to California law, that the hatchtender or foreman and the stevedore were fellow servants, there can be no question that the engineer or winchman, working on shore and not under a maritime contract of hire, was not a fellow servant, and, therefore, the major negligence of the engineer concurring with the minor negligence of the hatchtender would not relieve the master from liability.

Rjasko v. Penn. Coal Co., 241 Fed. 248;
Pick v. Central Pacific R. Co., 78 Cal. 38;
Carnegie Steel Co. v. Yukasz, 224 Fed. 438;
New Aetna, etc. Co. v. Holt, 231 Fed. 611.

The hatchtender is a foreman of stevedores.

Apostles on Appeal, pages 56, 59 and 61;
Brown v. Sennett, 68 Cal. 225.

As the above cases show, this court and federal courts have repeatedly applied adjudications by the Supreme Courts of state statutes in modification of the fellow servant doctrine. That federal courts, sitting as courts of admiralty, also look to the state laws to govern them in their conclusions as to who are fellow servants, is shown by the following authority:

Trauffler v. Detroit & Cleveland Navigation Co., 181 Fed. 262;

where it is said:

> "It may be doubted whether the master, the engineer and the fireman were fellow servants, but, *assuming that in the occupation of towing the steamer to her dock such relationship in admiralty or at common law existed, we must, as already pointed out, in this case look to the law of the state to guide us in our determination.* By the employer's liability act of the State of New York (chapter 600, Laws 1902), it is expressly provided that an employee or his representatives shall not be deprived of their remedies against the employer where the negligent act was committed by any person in the service of the employer intrusted with the duty of superintendence or whose sole or principal duty was that of superintendence. By analogy a master who has sole charge of the navigation of a tug peculiarly exercises the principal duties of superintendence, and I think it may therefore be held that the libelants have a right of

recovery against the Princeton, and, moreover, that both the tug and the steamer may be held. *Hayward v. Key,* 138 Fed. 34, 70 C. C. A. 402; *Sweet v. Perkins,* 196 N. Y. 482; 90 N. E. 50; *The Hamilton,* supra."

See

Siebert v. Patapasco Shipbuilding Co., 253 Fed. 685.

In this case, while the certificate of the Circuit Court of Appeals states that the death of Souza was caused by the negligence of fellow servants, it is the contention of respondent that this is an erroneous statement. In substantiation of this we ask the court to read the findings of the lower court heretofore stated. But even if the hatchtender and winchman were fellow servants at common law with the deceased Souza, still under 1970 of the Civil Code of this state and under the adjudications of the State Supreme Court based thereon, the negligence of the hatchtender and the winchman would still be the negligence of the master.

See

Korander v. Penn. Bridge Company, 16 Cal. App. 249;

Brown v. Sennett, 68 Cal. 225.

The third question is:

"DOES THE STATE STATUTE MERELY GIVE THE RIGHT OF ACTION AND LEAVE FOR APPLICATION THE RULES OF MARITIME LAW COVERING PERSONAL INJURIES, THUS DOING AWAY WITH ANY DISTINCTION HERETOFORE RECOGNIZED BETWEEN AN ACTION FOR PERSONAL INJURIES NOT RESULTING IN DEATH AND AN ACTION FOR INJURIES RESULTING IN DEATH?"

The very wording of this question admits that heretofore there has been a distinction between actions for personal injury not resulting in death and those resulting in death, and this is borne out by the case of *Schuede v. Zenith S. S. Co.*, 216 Fed. 571, the court saying:

> "We are not in conflict with the long line of cases cited and examined, dealing with deaths resulting from marine torts, and in which state laws are applied in proceedings in admiralty as well as in actions at law in State and Federal courts. * * * In admiralty no remedy exists for a death resulting from a marine tort. In Cornell Steamboat Co. v. Fallon, 179 Fed. 293 (Circuit Ct. of Appeals, Second Circuit), a death case, action at law under the New York modification of Lord Campbell's Act, it was pointed out that decedent, a seaman injured in the service of his vessel, had he lived to sue either at law or in admiralty, would have had his rights determined by the maritime law affecting his contract of employment, whereas, his administratrix was privileged to use the state law."

It may be contended that the *Schuede* case was not an admiralty case and hence states no admiralty law. However, the excerpt above is from *Cornell*

Steamboat Co. v. Fallon, which was an admiralty case.

This court in *Chelentis v. Luckenbach*, has recently laid down the rules which should govern in cases of recovery by seamen injured on high seas for personal injury in which it was stated that only wages, maintenance and cure could be recovered for personal injuries in admiralty cases. It will at once be seen by the court that none of these remedies would be sufficient or applicable in a death case. Of course, in a death case the wages immediately cease; there is no maintenance, and obviously no cure. Therefore, the contention that the same laws should be applied in death cases as are applied to personal injury cases, would seem absurd.

That there is a line of demarcation between death cases and personal injury cases, we think has been amply demonstrated, and we have also shown that admiralty courts will accept the state laws with all burdens and it therefore follows that respondent should be entitled to all benefits, and it so happens that Judge Dooling, who was the presiding judge in the District Court sitting in the trial of this case, has laid down the above doctrine.

See

Bjolstad v. Pac. Coast S. S. Co. et al., 244 Fed. 634;

and see also

Ex parte McNiel, 13 Wall. 236-242; 20 L. Ed. 624 (previously quoted),

where Mr. Justice Field says:

"A party forfeits nothing by going into a federal tribunal. Jurisdiction having attached, his case is tried there upon the same principles, and its determination is governed by the same considerations as if it has been brought in the proper state tribunal in the same locality. In no class of cases has the application of this principle been sustained by this court more frequently than in those of admiralty and maritime jurisdiction."

JENSEN CASE HAS NO APPLICATION

The *Jensen* case had nothing whatever to do with *wrongful* death and lays down no rule concerning applicability of state statutes by a court of admiralty in suits for *wrongful* death.

The Circuit Court of Appeals, we most respectfully contend, erroneously said in its opinion upon rehearing:

> "The numerous preceding and *conflicting decisions* of both federal and state courts with respect to the provisions of state statutes at variance with the general maritime law in suits for personal injuries were finally disposed of by the decision of the Supreme Court in the case of Southern Pacific Co. v. Jensen, 244 U. S. 205, so that we think it is unnecessary to make further reference to those cases. The Jensen case grew out of the *alleged wrongful death* of a person, *a right of action* for which was given by a state statute." (Italics ours.)

Southern Pacific Co. v. Jensen, 244 U. S. 205, did not grow out of alleged *wrongful death*, nor was a "right of action" given by the state compensation statute in question.

It had nothing to do with alleged *wrongful* death. No element of tort was involved therein. No item of wrong was alleged, tried or adjudicated. No claim of any kind was made as for alleged *wrongful* death.

The above being true, there is an analogy between the *Jensen* case and the case at bar, and, therefore, the *Jensen* case is no authority for decision in the instant case, and there exists the same distinction as has always existed and has always been recognized between actions in admiralty for personal injuries resulting in death and actions in admiralty not resulting in death.

The Jensen case and the N. Y. Compensation Law analyzed.

The *Jensen* case arose under the Workmen's Compensation law of the State of New York, *and not otherwise.* It seems necessary, therefore, in order to demonstrate the true meaning of the *Jensen* decision, to go to the very foundation of the New York statute.

This has already been done by the Supreme Court of the United States in *New York Central R. Co. v. White*, 243 U. S. 187; 61 L. Ed. 667.

In that case the constitutionality of the Workmen's Compensation Act of New York, upon which the liability in the *Jensen* case was later founded, was under review, and the court, speaking through *Mr. Justice Pitney*, thoroughly analyzes the Compensation Act of New York and sums it up, on page 674, 61 L. Ed., as follows:

> "Briefly, the statute imposes liability upon the employer to make compensation for disability or death of the employee resulting from accidental personal injury arising out of and in the course of the employment, *without regard to fault as a cause*, except where the injury or death is occasioned by the employee's wilful intention to produce it, or where the injury results solely from his intoxication while on duty."

The Supreme Court of the United States, in the above decision, at page 671, 61 L. Ed., cites the constitutional amendment upon which the Workmen's Compensation Act of New York is founded, which is as follows:

> "Section 19. Nothing contained in this Constitution shall be construed to limit the power of the Legislature to enact laws for the protection of the lives, health or safety of employees; or for the payment, either by employers, or by employers and employees or otherwise, either directly or through a state or other system of insurance or otherwise, of compensation for injuries to employees or for death of employees resulting from such injuries *without regard to fault as a cause thereof*, except where the injury is occasioned by the wilful intention of the injured employee to bring about the injury or death of himself or of another, or where the injury results solely from the intoxication of the injured employee while on duty, or for the adjustment, determination and settlement, with or without trial by jury, of issues which may arise under such legislation, or to provide that the right of such compensation, and the remedy therefor shall be exclusive of all other rights and remedies for injuries to employees or for death resulting

> from such injuries; or to provide that the amount of such compensation for death shall not exceed a fixed or determinable sum; provided that all moneys paid by an employer to his employees or their legal representatives, by reason of the enactment of any of the laws herein authorized, shall be held to be a proper charge in the cost of operating the business of the employer."

Southern Pacific v. Jensen followed the decision in the case of *New York Central v. White,* and the Supreme Court of the United States simply affirmed in the *Jensen* case their previous holding in the *White* case, the court saying in the *White* case:

> "The scheme of the act is so wide a departure from common-law standards respecting the responsibility of employer to employee that doubts naturally have been raised respecting its constitutional validity."

If the whole decision in the *White* case is read it will only strengthen the citations of the excerpts above given, and appellee's assertion that the *Jensen* case does not apply to the case at bar, will be fortified.

Liability under the New York statute to pay stated amounts for accidental death was fixed as an economic measure without regard to fault, negligence, wrong or tort. Compensation statutes of the various states are worded similarly, as, for instance, the California statute:

> "Sec. 6. Liability for the compensation provided by this act, in lieu of any other liability whatsoever to any person, *shall, without regard*

> *to negligence,* exist against an employer for any injury sustained by his employee arising out of and in the course of the employment and for the death of any such employee, * * *."

The only suggestion in the New York statute of fault or wrong is in the exception covering wilful intention of the employee to bring about his death.

In the *Jensen* case that could mean nothing else than suicide of the man *Jensen.* No such suggestion was ever made in any tribunal before which the case came. Neither was it suggested that Jensen was intoxicated at the time of his death, which is the only other provision of the constitutional amendment which might import the idea of fault.

This much is certain, that the liability of the employer is fixed irrespective of fault. The enactment of the state statute of New York followed the adoption of the constitutional amendment above quoted. This is Section 10 of Chapter 816, Laws of 1913, as re-enacted in 1914:

> "Every employer subject to the provisions of this chapter shall pay or provide as required by this chapter compensation according to the schedules of this article for the disability or death of his employee resulting from an accidental personal injury sustained by the employee arising out of and in the course of his employment, *without regard to fault as a cause of such injury,* except where the injury is occasioned by willful intention of the injured employee to bring about the injury or death of himself or another, or where the injury results solely from intoxication of the injured employee while on duty. Where the injury is

occasioned by the willful intention of the injured employee to bring about the injury or death of himself or of another, or where the injury results solely from the intoxication of the injured employee while on duty, neither the injured employee nor any dependent of such employee shall receive compensation under this chapter."

It will be noted that the enactment follows the constitutional amendment with great fidelity, and the same comment made above on the constitutional amendment is applicable to the statute.

Can anything be plainer than that the New York statutes under which the *Jensen* case arose and under the facts of that case, as stated in the opinion itself, that the *Jensen* case had nothing whatever to do with *wrongful death* or "alleged *wrongful death*"? **Is it not equally plain, therefore, that the Jensen decision can have no application whatever in this suit for wrongful death?**

The whole decision by the Supreme Court of the United States in the Jensen case was that the New York statute did not provide a "right of action", a "suit" or a "remedy" known to the common law.

Here is the decision in the *Jensen* case:

"Exclusive jurisdiction of all civil cases of admiralty and maritime jurisdiction is vested in the Federal District Courts, 'saving to suitors in all cases the right of a common law remedy where the common law is competent to give it'. *The remedy which the compensation statute attempts to give is of a character wholly unknown to common law, incapable of enforcement by*

the ordinary processes of any court, and is not saved to suitors from the grant of exclusive jurisdiction."

Under this characterization, where is there given an "action" by the New York state statute? For it is said that the thing given is of a character wholly unknown to the common law. If it were a "suit" or "action" it would not be so far removed from the common law as to be such an utter stranger to it.

So the *Jensen* case only holds that the New York compensation statute does not provide a "suit" or "action" to cover a claim for compensation, which holding is directly opposed to what was stated by the Circuit Court of Appeals in the decision of this case upon rehearing.

The *Jensen* case itself fully and wholly recognizes the proposition that there was in the case no suggestion of "alleged wrongful death", which is contrary to the statement made by that court in the decision of the case at bar.

Mr. Justice McReynolds states in the *Jensen* case:

> "Compensation is to be made *without regard to fault* as a cause of the injury, except where it is occasioned by the willful intention of the injured employee to bring about the injury or death of himself or another, or results solely from his intoxication while on duty. *Compensation is not based on the rule of damages applied in negligence suits, but, in addition to providing for medical, surgical or other attendance or treatment and funeral expenses it is based solely on loss of earning power."* * * *

The protest of the prevailing opinion in the *Jensen* case was against encroachment upon admiralty jurisdiction, not by the character and enforcement of liability for a tortious death, but upon the fixture of an obligation unknown, in either substance or form, to the common law, and after all the reasoning of the opinion, the actual decision is found near the end of it in the quotation from the case above set forth.

We, therefore, have in the New York constitutional amendment, in the New York statute and in the decisions in the *White* and *Jensen* cases emphatic and express negatives of the language of the Circuit Court of Appeals in the opinion upon rehearing and upon which erroneous view that court turned its entire decision in its final discussion of the case.

The *Jensen* case holds further: The general maritime law may be changed, modified or affected by state legislation, saying:

> "That this may be done to some extent cannot be denied (citing instances) * * * and the right given to recover in death cases (citing cases). * * * See The City of Norwalk, 55 Fed. 98, 106."

As a last word, before discussing the statute of limitations, we most respectfully assert that there are no decisions in "conflict" with the authorities heretofore cited by us, as no court has ever refused to apply state statutes in wrongful death cases.

STATUTE OF LIMITATIONS.

We are not advised of the reason why this court has asked for the entire record to be certified, but as some reference was made to the statute of limitations in the argument of attorneys for appellant on March 18, 1921, and some reference was made thereto in their brief, we will here state our position in regard to the application of the state statute of limitations.

When the questions were prepared by proctors for respondent, it was thought advisable (to meet the possible wishes of the Circuit Court of Appeals) to incorporate therein a fourth question, and this was done, the question reading as follows:

> **"4. Is the libelant barred by the statute of limitations, or is the admiralty court authorized to entertain the libel upon a showing of sufficient excuse for failure to bring the libel within the time fixed by the general state statute of limitations?"**

The Circuit Court of Appeals saw fit, in its wisdom, to modify the certificate by striking from it the foregoing question, **for the reason that it was clearly shown that all the delay prior to bringing this suit in admiralty was occasioned by the actions of the appellant, Western Fuel Company, and the rule of laches should prevail as the law of the forum.**

It will be remembered in this connection that the Western Fuel Company lulled the widow and children into a sense of security by paying the installments due under the aforesaid award until one day in excess of the statute of limitations for suit in

the California state courts for liability for wrongful death, and that they then took advantage of the *Jensen* case, decided in May of 1917, and on August 6th, 1917, had the award in favor of the widow annulled.

The right given under 1970 of the Civil Code of the State of California has no limitations attached to it as to the length of time in which suit must be brought. The limitation of actions for the State of California is found in another code, to-wit, Section 337 of the Code of Civil Procedure, which provides for a limitation of one year.

The very question thus involved has been passed upon by *Federal Judge Wolverton* in the case of *Gregory v. S. P. Co.*, 157 Fed. 113, in which he held that suit for wrongful death based upon an injury happening in California and based upon the sections of the California law authorizing such recovery, might be enforced in Oregon within two years, notwithstanding the fact that the law of limitation of action for recovery in that case in California was one year, and we ask the court to read the decision of Judge WOLVERTON, as he discusses thoroughly the question here involved.

This action is further supported by *Theroux v. N. P. R. Co.*, 64 Fed. 84:

> "It must be accepted, therefore, as the established doctrine, that where a statute confers a new right which by the terms of the act is enforceable by suit only within a given period, the period allowed for its enforcement is a constituent part of the liability intended

> to be created, and of the right intended to be conferred. **The period prescribed for bringing suit in such cases is not like an ordinary statute of limitations which merely affects the remedy."**

It will be contended by our learned opponents that the statute of limitations of California should apply, and cases may be cited in which such statutes of limitation have been applied, but if the court will read those cases they will find that the law of those states placed a limitation upon the right of recovery by making the statute read "provided" suit is brought within a certain length of time, and the limitation of time for suit will be found within the statute giving the right of suit.

NO SUCH LIMITATION IS CONTAINED IN SECTION 1970, CIVIL CODE OF CALIFORNIA, AND TIME IS NOT MADE THE ESSENCE OF THE RIGHT TO SUE.

This is clearly shown by Gregory v. S. P. Co. (*supra*).

That courts of admiralty recognize the rule of laches in suits of this kind, is shown by a decision of this court in *"The Harrisburg"*, 119 U. S. 96; 30 L. Ed. 362, where Mr. Justice WAITE in construing a statute in which a right of action to sue for death was given "provided" suit be commenced within a limited period, said:

> "The statute creates a new legal liability, with the right to sue for its enforcement, *provided* the suit is brought within 12 months, and not otherwise. The time within which the suit must be brought operates as a limitation

of the liability itself, as created, and not of the remedy alone. It is a condition attached to the right to sue at all. No one will pretend that the suit in Pennsylvania or the indictment in Massachusetts, could be maintained if brought or found after the expiration of the year, and it would seem to be clear that, if the admiralty adopts the statute as a rule of right to be administered within its own jurisdiction, it must take the right subject to the limitations which have been made a part of its existence. * * * Time has been made the essence of this right, and the right is lost if the time is disregarded. The liability and the remedy are created by the same statute and the limitations of the remedy are, therefore, to be treated as limitations of the right. *No question arises in this case as to the power of a court of admiralty to allow an equitable excuse for delay in suing, because no excuse of any kind has been shown.*" (Italics supplied.)

Ample excuse for delay was shown in this case.

LIMITATION OF ACTIONS IS A LAW OF THE FORUM AND THE LAW OF THE FORUM GOVERNS WHEN THERE IS A CONFLICT AS TO LIMITATIONS OF ACTIONS.

O'Sullivan v. Felix, 233 U. S. 318; 34 S. Ct. 596; 58 L. Ed. 980;

Curtis v. Metcalf, 259 Fed. 961;

Graham v. Engleman, 263 Fed. 166, 167;

Memphis v. Bd. of Directors, 231 Fed. 217;

Cooper v. Jewell, 233 Fed. 618;

Gregory v. Southern Pacific, 157 Fed. 113; construing California St. of Lim. Sec. 340 & Sec. 377, C. C. P.;

Theroux v. N. P. R. R. Co., 64 Fed. 84;
Chappell v. Thompson, 21 Cal. App. 136;
Lamberton v. Grant (Me.), 48 Atl. 127;
Hutchings v. Lamson, 96 Fed. 720 (CCA);
Underwood v. Patrick, 94 Fed. 468.

The law of laches is a characteristic feature of admiralty law and governs in a suit for negligent death.

The Harrisburg, 119 U. S. 96; 30 L. Ed. 362:

> "Time has been made the essence of the right, and the right is lost if the time is disregarded. The liability and the remedy are created by the same statute and the limitations of the remedy are, therefore, to be treated as limitations of the right. *No question arises in this case as to the power of a court of admiralty to allow an equitable excuse for delay in suing, because no excuse of any kind has been shown."* (Italics supplied.)

A writ of review, such as was the procedure for reviewing the award of the California Industrial Accident Commission is not an appeal and hence no subsequent action could have been maintained in the state court pursuant to Sec. 355, C. C. P., of California.

Fay v. Costa, 2 Cal. App, 241:

The widow and children having been deprived of their right to sue in the state court by reason of the actions of the Western Fuel Co. it became necessary to seek relief in the admiralty courts.

This action was warranted by the facts which brought the case within the purview of admiralty and by the law:

Lincoln v. Cunard S. S. Co., 221 Fed. 622, where it was held that where:

> "Within the time prescribed by state statutes an action at law to recover for personal injuries inflicted by a steamship was brought against the owner in a Federal Court in New York, *but from various causes not chargeable to the fault of plaintiff was delayed for more than two years when it was dismissed for want of jurisdiction* without prejudice, *and a new action in admiralty was commenced at once, the case was so far exceptional that libelant would not be charged with laches to defeat the suit.*"

See also *Fill v. Cunard S. S. Co.,* 217 Fed. 84.

Both the Circuit Court of Appeals and the District Court were entirely satisfied on this point, the District Court saying:

> **"4. As the beneficiaries here were for a year engaged in the prosecution of their supposed rights under the Workmen's Compensation Act, their delay in bringing the present action is accounted for so as to remove the bar of limitations."**

Courts of admiralty are not bound by state statutes in determining the question of laches; they govern themselves by the analogies only, in the absence of special or exceptional circumstances.

1 Corpus Juris, 1329 and cases cited;

Davis v. Smokeless Fuel Co., 182 Fed. 1004 (aff. 196 Fed. 753).

We have heretofore pointed out the special and exceptional circumstances existing in the instant case.

The delay in this action was all caused by the Western Fuel Company. **Is it to profit by the tactics employed?**

There are no "international" or "interstate" questions involved in the matter now before this court, and hence there can be no interference with uniformity of admiralty law if Sec. 1970, Civil Code of California, is applied *in toto.*

It clearly appears from all the pleadings and the admitted facts that this is a case solely between citizens of California; there being a widow and five minor children, residents and citizens of California, on the one side, and the Western Fuel Company, a California corporation, on the other side.

No ship was ever libeled or involved in any way. The "Tancred" has at all times since the accident been free to go on its way without hindrance, and no obstruction to shipping or navigation ever arose.

The ship was under charter to the Western Fuel Company and the decedent, Souza, a citizen of California, was in the employ of that corporation, and it alone was sued by a libel *in personam.*

Had this accident happened to Souza while in the employ of the same corporation and while shoveling coal on shore, no question as to the applicability of Sec. 1970, Civil Code of California, would have arisen.

So the question, therefore, is: Whether Souza being killed while located on a vessel tied to a dock gives this corporation, a creature of the law of California, greater rights of defense than is enjoyed by any other California corporation?

We have shown by an abundance of authority that state laws are applied by admiralty courts in death cases except where they conflict with "characteristic" features of admiralty law in its interstate or international relations.

Will the proctors for appellant point out what "characteristic" law applicable in cases of *wrongful death* is violated if the laws which we contend for are applied? Will they show where any "interstate" or "international" complications will arise, when all the parties herein involved are citizens of California and where the accident happened in California waters?

"Uniformity of Admiralty Law" has become a fetich in this case, without any statement being made as to what uniform laws applicable in a death case have been violated.

We have shown that the rule of laches is a characteristic feature of admiralty courts, applicable in all cases, and that respondent is not guilty thereof, and further, that the law of limitations of actions is a law of the forum, and that the law of the forum rules where there is a conflict.

We realize the necessity of encouraging shipping and navigation, and, of course, labor has rights

equal to shipowners, and we believe, therefore, that uniformity of admiralty law will not be jeopardized and harmonious relations will best be established by the answering of Questions 1 and 2 in the affirmative and Question 3 in the negative.

Dated, San Francisco,
September 21, 1921.

Respectfully submitted,

CHRISTOPHER M. BRADLEY,
HENRY HEIDELBERG,
Proctors for Respondent.

FILED
MAR 16 1920
JAMES D. MAHER,
CLERK.

No. 28

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1919

WESTERN FUEL COMPANY, (a corporation),
Petitioner,

vs.

ANTONE GARCIA, as administrator of the estate of Manuel Souza, deceased,
Respondent.
(Libelant below)

BRIEF ON BEHALF OF RESPONDENT (LIBELANT BELOW) in Opposition to the Issuance of a Writ of Certiorari from the Supreme Court of the United States to the United States Circuit Court of Appeals for the Ninth Circuit.

CHRISTOPHER M. BRADLEY,
Proctor for Respondent.

HENRY HEIDELBERG,
Of Counsel.

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No. 689

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1919

WESTERN FUEL COMPANY, (a corporation),
Petitioner,

vs.

ANTONE GARCIA, as administrator of the estate of Manuel Souza, deceased,
Respondent.
(Libelant below)

BRIEF ON BEHALF OF RESPONDENT (LIBELANT BELOW) in Opposition to the Issuance of a Writ of Certiorari from the Supreme Court of the United States to the United States Circuit Court of Appeals for the Ninth Circuit.

The Writ of Certiorari should be denied and the questions certified should be answered upon the briefs submitted by the petitioner in support of the petition for the writ and this brief in opposition

thereto, as all questions for decision are fully covered by the briefs.

Statement as to Facts.

Although the petition for the Writ of Certiorari contains an exhaustive statement of facts, it is earnestly and respectfully urged that there is not left for the consideration of the court any question of fact, but questions of law alone. The findings of the District Court approved by the Circuit Court of Appeals were as follows:

> **1. The death of Souza was due to the negligence of Hayes in withdrawing the bucket from the hopper before it was fully dumped and to the negligence of the hatch-tender in not giving warning to those in the hold.**
>
> **2. The deceased was not guilty of contributory negligence in being where he was, as there was coal there to be discharged and he was preparing to discharge it.**
>
> **3. Nor did the risk of his employment include the dumping of the quantity of coal that fell through the hatch at the time of the accident, even though it be conceded that he assumed the ordinary risk of his employment due to the occasional falling of a lump of coal.**

Indeed, the foregoing is admitted by the petitioner in the following language on page 5 of the petition:

> **"The trial court found and the finding was approved by the Circuit Court of Appeals that the accident was caused by the negligence of the dump man and the hatch-tender."**

As to Questions of Law.

The certificate sent up by the Circuit Court of Appeals contains a wholly sufficient recital of essential facts, and the questions propounded are entirely broad enough to cover, and do cover fully, the only questions of law about which there can be any doubt in the minds of the Honorable Judges of the Circuit Court of Appeals.

At page 10 of the petition for the writ, the petitioner has assumed to state three additional questions, numbered, respectively, 4, 5, and 6.

Petitioner's question 4 is obviously a mere argumentative quibble, as everything in it is more than covered by the questions sent up.

Question 5 is, in the same sense, wholly surplusage.

As to petitioner's additional question 6: Neither the District Court nor the Circuit Court of Appeals found any difficulty whatever in applying what petitioner is pleased to call "recognized principles of maritime law" and "the consistent and uniform body of maritime law".

In fact, when the writers of this brief prepared the certificate for the Circuit Court of Appeals, it was thought, out of abundant caution and courtesy to the court, advisable to incorporate in the questions to be propounded one covering the point concerning the statute of limitations, and this was done in the following form:

> "4. Is the libelant barred by the statute of limitations, or is the admiralty court authorized to entertain the libel upon a showing of sufficient excuse for failure to bring the libel within the time fixed by the general state statute of limitations?"

The Circuit Court of Appeals saw fit, in its wisdom, to modify the certificate by striking from it the foregoing question, but did not modify it in any other respect.

However, in the appropriate place in this brief, we will deal with the stated question concerning the statute of limitations, not because we admit it is in the case before this court, not because we do not insist that it has been finally passed upon after mature consideration, but again out of abundant caution and courtesy to the court.

Points and Authorities.

I.

COURTS OF ADMIRALTY WILL ENFORCE ALL THE SUBSTANTIVE AND INCIDENTAL RIGHTS CONFERRED BY STATE STATUTES GIVING A RIGHT OF ACTION FOR WRONGFUL DEATH.

All the authorities agree that the general admiralty law afforded no remedy for death.

For an admiralty court to take cognizance of a death case, the action must be founded upon a state statute, and there cannot be cited a single case in an admiralty court of a suit for *wrongful death* in

which the substantive rights conferred by the state statutes have not been enforced with all their incidents.

The first case, and the leading one in the United States, in which suit for wrongful death was allowed by a court of admiralty was *Steamboat Co. v. Chace*, 16 Wall. 522.

Mr. Justice Field says, in plain and emphatic language in *Sherlock v. Alling*, 93 U. S. 99, that state statutes will be enforced in a suit for wrongful death, saying:

> "But with reference to a great variety of matters touching the rights and liabilities of persons engaged in commerce, either as owners or navigators of vessels, *the laws of congress are silent, and the laws of the state govern. The rules for the acquisition of property by persons engaged in navigation, and for its transfer and descent, are, with some exceptions, those prescribed by the state to which the vessels belong; and it may be said, generally, that the legislation of a state, not directed against commerce or any of its regulations, but relating to the rights, duties and liabilities of citizens, and only indirectly and remotely affecting the operations of commerce, is of obligatory force upon citizens within its territorial jurisdiction, whether on land or water, or engaged in commerce, foreign or interstate, or in any other pursuit.* In our judgment, *the statute of Indiana falls under this class.* Until congress, therefore, makes some regulation touching the liability of the parties injured, *we are of opinion that the statute of Indiana applies, giving a right of action in such cases to the personal representatives of the deceased;* and

that, as thus applied, it constitutes no encroachment upon the commercial power of congress." (Italics ours.) (Pages 103, 104.)

The City of Norwalk, 55 Fed. 98, 106-107 (aff'd 61 Fed. 364), discusses the proposition of the enforcement of state statutes in a suit for wrongful death. The opinion is very exhaustive and has been cited and upheld repeatedly, the last instance being in *Southern Pacific Co. v. Jensen*.

In *The City of Norwalk*, 55 Fed. 98, the court said (aff. 61 Fed. 364 (367) Cir. Ct. 2d Circuit, Judge Lacombe):

> "The law administered in the admiralty courts of this country embraces not merely what is peculiar to the maritime law, but also much of the municipal local law, derived from the constituted order of the state and all competent state and national legislation. What is peculiar to the maritime law, or that which by its interstate or international relations would be incompatible with diverse state legislation, can be changed by Congress alone, which by implication, has the general power of legislation on the maritime law. This does not exclude state legislation upon maritime subjects of a local nature, *nor legislation under the police power for the preservation of life or health*, nor incompatible with interstate and international interests in the absence of legislation by Congress. A state statute giving damages for death by negligence, as applied to a negligent collision on navigable waters, within the State does not infringe those conditions, and is valid." (Italics supplied.)

We urgently impress upon the court our desire that this court read pages 106 and 107 of *The City*

of Norwalk, supra, in which the police power of the states is discussed with reference to the protection of the lives of the citizens of the state, and ask this court, in so reading, to have in mind that the Western Fuel Company is a California corporation, the deceased Souza was also a citizen of California, the accident that caused his death occurred in the State of California, and his dependent widow and five minor children are residents and citizens of the State of California.

The following cases hold that state statutes must be enforced in a suit for wrongful death, and that, notwithstanding that comparative negligence is the rule in admiralty, where a suit is brought by virtue of a state statute, if, by the law of that state, contributory negligence bars recovery in the state courts, contributory negligence will bar recovery in the admiralty courts:

Cornell Steamboat Co. v. Fallon, 179 Fed. 283;

Gretschmann v. Fix, 189 Fed. 716;

Robinson v. Detroit, etc., 73 Fed. 883;

Stern v. La Compagnie, etc., 110 Fed. 996;

Monongahela River, etc. v. Schinnerer, 196 Fed. 375.

The last cited case contains the following quotation from *Ex parte McNiel*, 13 Wall. 236-242; 20 L. Ed. 624:

> "A state law cannot give jurisdiction to any federal court; but that is not a question in this case. A state law may give a substantial

right of such a character that, where there is no impediment arising from the residence of the parties, the right may be enforced in the proper federal tribunal, whether it be a court of equity, of admiralty, or of common law. The statute in such cases does not confer the jurisdiction. That exists already, and it is invoked to give effect to the right by applying the appropriate remedy. This principle may be laid down as axiomatic in our national jurisprudence. *A party forfeits nothing by going into a federal tribunal.* Jurisdiction having attached, his case is tried there upon the same principles, and its determination is governed by the same considerations, as if it had been brought in the proper state tribunal of the same locality. *In no class of cases has the application of this principle been sustained by this court more frequently than in those of admiralty and maritime jurisdiction.*"

In the case of *Quinette v. Bisso, et al.*, 136 Fed. 825, the question of what state laws would be given effect in admiralty in a case of wrongful death was passed on, and the law of the case is stated in the syllabus:

> "An action in admiralty for wrongful death, based on Civ. Code L. Art. 2315, is governed by the local law with respect to the defense of contributory negligence."

Further:

> "A federal court, in administering a state statute giving a right of recovery for wrongful death will follow the decisions of the highest court of the state with respect to the measure of damages."
>
> COURT. "Without this statute the libelant could not maintain her libel. The statute must

be applied in admiralty just as if the suit had been brought in the state courts, and any defenses which are open to the defendant under the jurisdiction of the state, if successfully maintained, will bar recovery under the libel."

Citing:

The Harrisburg, 119 U. S. 199; 30 L. ed. 358;
The Alaska, 130 U. S. 201; 32 L. ed. 923;
The Oregon, 45 Fed. 62.

It follows, of course, that if defenses can be added by state statute in a court of admiralty, they can thus be taken away, and hence the contention is sound that California state laws as to assumption of risk, contributory negligence and negligence of a fellow servant are applicable in a court of admiralty.

There is a clear line of demarcation between personal injury cases and wrongful death cases.

This was recognized in *Schuede v. Zenith S. S. Co.*, 216 Fed. 571, the court saying:

"We are not in conflict with the long line of cases cited and examined, dealing with deaths resulting from marine torts, and in which state laws are applied in proceedings in admiralty as well as in actions at law in State and Federal courts. * * * In admiralty no remedy exists for a death resulting from a marine tort. In *Cornell Steamboat Co. v. Fallon*, 179 Fed. 293 (Circuit Ct. of Appeals, Second Circuit), a death case, action at law under the New York modification of Lord Campbell's Act, it was pointed out that decedent, a seaman injured in the service of his vessel, had he lived to sue either at law or in admiralty, would have had

his rights determined by the maritime law affecting his contract of employment, whereas, his administratrix was privileged to use the state law."

(The above case was affirmed in 244 U. S. 646; 37 Sup. Ct. Rep. 652; 61 L. ed. 1369.)

The status of fellow servants in an admiralty court will be governed by the provisions of the statute under which suit for death is brought.

Trauffler v. Detroit & Cleveland Navigation Co., 181 Fed. 262:

"It may be doubted whether the master, the engineer, and the fireman were fellow servants, but, assuming that in the occupation of towing the steamer to her dock such relationship in admiralty or at common law existed, we must, as already pointed out, in this case look to the law of the state to guide us in our determination. By the employers' liability act of the State of New York (chapter 600, Laws 1902), it is expressly provided that an employe or his representatives shall not be deprived of their remedies against the employer where the negligent act was committed by any person in the service of the employer intrusted with the duty of superintendence or whose sole or principal duty was that of superintendence. By analogy a master who has sole charge of the navigation of a tug peculiarly exercises the principal duties of superintendence, and I think it may therefore be held that the libelants have a right of recovery against the Princeton, and, moreover, that both the tug and the steamer may be held. *Hayward v. Key*, 138 Fed. 34, 70 C. C. A. 402; *Sweet v. Perkins*, 196 N. Y. 482; 90 N. E. 50; *The Hamilton*, supra."

As the court will note by reference to Section 1970 of the California Civil Code, quoted at pages 6, 7 and 8 of the petition for the writ, the California statute respecting the status of fellow servants is similar in its provisions to the New York statute, which the court mentions in the case last cited.

THE JENSEN DECISION NO AUTHORITY.

Under the heading "The characteristic features of admiralty law may not be materially interfered with by state statutes", petitioner at page 22 of the petition for the writ leans its whole weight on the *Jensen* case, which is the only death case in the books in which admiralty has denied the application in any respect of a state statute conferring the right of recovery, and it did so because that was a case arising under a Workmen's Compensation law.

The case at bar is a right of action, or libel, for *wrongful* death and it has always been "the characteristic feature of the maritime law" to enforce state death statutes giving a remedy for wrongful death.

Southern Pacific Co. v. Jensen, 244 U. S. 205, did not grow out of *alleged wrongful death*, nor was a "right of action" given by state statute.

It had nothing to do with alleged wrongful death. No element of tort was involved therein. No item of wrong was alleged, tried or adjudicated. No

claim of any kind was made as for alleged wrongful death.

The above being true, there is no analogy between the *Jensen* case and the case at bar, and, therefore, the *Jensen* case is no authority or decision in the instant case, and there exists the same distinction as has always existed and has always been recognized between action in admiralty for personal injuries resulting in death and actions in admiralty not resulting in death.

The Jensen case and the N. Y. Compensation Law analyzed.

The *Jensen* case arose under the Workmen's Compensation law of the State of New York, *and not otherwise*. It seems necessary, therefore, in order to demonstrate the true meaning of the *Jensen* decision, to go to the very foundation of the New York statute.

This has already been done by the Supreme Court of the United States in *New York Central R. Co. v. White*, 243 U. S. 187; 61 L. Ed. 667.

In that case the constitutionality of the Workmens' Compensation Act of New York, upon which the liability in the *Jensen* case was later founded, was under review, and the court, speaking through Mr. Justice Pitney, thoroughly analyzes the Compensation Act of New York and sums it up, on page 674, as follows:

> "Briefly, the statute imposes liability upon the employer to make compensation for disability or death of the employee resulting from

> accidental personal injury arising out of and in the course of the employment, *without regard to fault as a cause,* except where the injury or death is occasioned by the employee's wilful intention to produce it, or where the injury results solely from his intoxication while on duty."

Southern Pacific v. Jensen followed the decision in the case of *New York Central v. White*, and this court simply affirmed in the *Jensen* case its previous holding in the *White* case, the court saying in the *White* case:

> "The scheme of the act is so wide a departure from common-law standards respecting the responsibility of employer to employee that doubts naturally have been raised respecting its constitutional validity."

That a right of action is not given by the New York act is made plain, where Mr. Justice Pitney says in the very first line of the decision that it is a "claim".

If the whole decision in the *White* case is read it will only strengthen the citations of the excerpts above given, and appellee's assertion that the *Jensen* case does not apply to the case at bar, will be fortified.

Liability under the New York statute to pay stated amounts for accidental death was fixed as an economic measure without regard to fault, negligence, wrong or tort.

The only suggestion in the New York statute of fault or wrong is in the exception covering wilful intention of the employee to bring about his death.

In the *Jensen* case that could mean nothing else than suicide of the man Jensen. No such suggestion was ever made in any tribunal before which the case came. Neither was it suggested that Jensen was intoxicated at the time of his death, which is the only other provision of the constitutional amendment which might import the idea of fault.

This much is certain, that the liability of the employer is fixed irrespective of fault.

Can anything be plainer than this: The Jensen case had nothing whatever to do with wrongful death, because it was based upon the Workmen's Compensation Law of the State of New York?

Is it not, therefore, plain that the Jensen decision has no application whatever in this suit or libel for wrongful death?

The whole decision by the Supreme Court of the United States in the *Jensen* case was that the New York statute did not provide a "right of action", a "suit" or a "remedy" known to the common law.

Here is the decision in the *Jensen* case:

> "Exclusive jurisdiction of all civil cases of admiralty and maritime jurisdiction is vested in the Federal District Courts, 'saving to suitors in all cases the right of a common law remedy where the common law is competent to give it'. *The remedy which the compensation statute attempts to give is of a character wholly unknown to common law, incapable of enforcement by the ordinary processes of any court, and is not saved to suitors from the grant of exclusive jurisdiction.*"

Under this characterization, where is there given an "action" by the New York state statute? For it is said that the thing given is of a character wholly unknown to the common law. If it were a "suit" or "action" it would not be so far removed from the common law as to be such an utter stranger to it.

So the *Jensen* case only holds that the New York compensation statute does not provide a "suit" or "action" to cover a claim for compensation, which holding cannot apply in the case at bar; this is an action, a suit, in familiar form, to be adjudicated under familiar rules of law.

The *Jensen* case itself fully and wholly recognizes the proposition that there was in the case no suggestion of "alleged wrongful death".

Mr. Justice McReynolds states in the *Jensen* case:

> "Compensation is to be made without regard to fault as a cause of the injury, except where it is occasioned by the willful intention of the injured employee to bring about the injury or death of himself or another, or results solely from his intoxication while on duty. *Compensation is not based on the rule of damages applied in negligence suits, but, in addition to providing for medical, surgical or other attendance or treatment and funeral expenses it is based solely on loss of earning power.* * * *
>
> "Under the construction adopted by the state courts no ship may be loaded or discharged without incurring a penalty unless her owners comply with the act which, in order to secure payment of *compensation for accidents,*

generally without regard to fault and based upon annual wages, provides (Sec. 50):"

The protest of the prevailing opinion in the *Jensen* case was against encroachment upon admiralty jurisdiction, not by the character and enforcement of liability for a tortious death, but upon the fixture of an obligation, unknown, in either substance or form, to the common law, and after all the reasoning of the opinion, the actual decision is found near the end of it in the quotation from the case first above set forth.

We, therefore, have in the New York constitutional amendment, in the New York statute and in the decision in the *White* and *Jensen* cases emphatic and express negatives of the position taken by the petitioner.

The *Jensen* case holds further: The general maritime law may be changed, modified or affected by state legislation, saying:

> **"That this may be done to some extent cannot be denied (citing instances) * * * and the right given to recover in death cases (citing cases). * * * See The City of Norwalk, 55 Fed. 98, 106."**

II.

A COURT OF ADMIRALTY WILL ENFORCE A STATE STATUTE OF LIMITATIONS, BY ANALOGY, BUT WHERE CIRCUMSTANCES ARE SUCH AS TO EXCUSE DELAY, THE ADMIRALTY RULE OF LACHES WILL BE APPLIED. THE ONLY EXCEPTION TO THIS RULE IS WHERE THE STATE STATUTE CONFERRING THE RIGHT OF ACTION FOR DEATH EXPRESSES A LIMITATION IN THE STATUTE ITSELF, EITHER FIXING THE TIME OR MAKING THE ASSERTION OF THE RIGHT WITHIN A FIXED TIME A CONDITION TO THE MAINTENANCE OF THE ACTION.

All the cases cited by the petitioner are cases falling within the exception. Section 1970 of the Civil Code of the State of California does not contain within itself any limitation of time within which rights under it shall be asserted, the statute of limitations of California being found in another code, the Code of Civil Procedure. The section of the Code of Civil Procedure was enacted in 1872 and the particular subdivision, 3, has never been amended since its enactment. Section 1970 of the Civil Code was amended in 1903 and again in 1907, and was amended in the particulars upon which the respondent libelant relies (Stats. 1903, p. 256; Stats. 1907, p. 119).

The construction of these statutes and the decision as to the rule of law applicable in their enforcement are not new.

In *Gregory et al. v. Southern Pacific Co.*, 157 Fed. 113, Judge WOLVERTON passed up upon the very question raised here and laid down the rule that an action based upon Sec. 377 of Civil Code of Procedure of California might be brought in Oregon

within the statutory time provided by the laws of Oregon, although the right of action was barred by the California statute of limitations (Sec. 340 C. C. P., sub. 3), holding that Sec. 1970, Civil Code of California, might be enforced without the necessity of enforcing Sec. 340, C. C. P. of California.

In many states substantive rights and the time in which such rights must be asserted are contained within the law giving the right of action, and in these cases it has been held that the requirement as to time of commencing the action is a part of the statute creating that right. This is not the case where the right of action is given by one law and there exists a general and separate statute of limitations for beginning various actions.

In *Theroux v. Northern Pac. R. Co.*, 64 Fed. 84, it was said:

> "It must be accepted, therefore, as the established doctrine, that where a statute confers a new right which by the terms of the act is enforceable by suit only within a given period, the period allowed for its enforcement is a constituent part of the liability intended to be created, and of the right intended to be conferred. The period prescribed for bringing suit in such cases is not like an ordinary statute of limitations which merely affects the remedy."

In *The Harrisburg*, 119 U. S. 96; 30 L. Ed. 362, Mr. Justice Waite, in construing a statute in which a right of action to sue for death was given "provided" suit be commenced within a limited period, said:

"The statute creates a new legal liability, with the right to sue for its enforcement, *provided* the suit is brought within 12 months, and not otherwise. The time within which the suit must be brought operates as a limitation of the liability itself, as created, and not of the remedy alone. It is a condition attached to the right to sue at all. No one will pretend that the suit in Pennsylvania or the indictment in Massachusetts, could be maintained if brought or found after the expiration of the year, and it would seem to be clear that, if the admiralty adopts the statute as a rule of right to be administered within its own jurisdiction, it must take the right subject to the limitations which have been made a part of its existence. * * * Time has been made the essence of the right, and the right is lost if the time is disregarded. The liability and the remedy are created by the same statute and the limitations of the remedy are, therefore, to be treated as limitations of the right. *No question arises in this case as to the power of a court of admiralty to allow an equitable excuse for delay in suing, because no excuse of any kind has been shown.*" (Italics supplied.)

As outlined in the petition herein, the widow of Manuel Souza, soon after his death on August 5, 1916, brought proceedings before the Industrial Accident Commission of the State of California to recover compensation for the irreparable injury which she and her five children had suffered.

Within a short space of time she was given an award by the Commission, which award was contested by Western Fuel Company, and proceedings continued until August 6, 1917, when upon motion

by counsel of the Western Fuel Company before the Supreme Court of the State of California, the award theretofore made by the Industrial Accident Commission of the State of California was annulled on the ground of lack of jurisdiction of the Commission to make the award. This was done under the rule in the *Jensen* case, as the law then under construction was the California Compensation Statute.

In *Lincoln v. Cunard S. S. Co.*, 221 Fed. 622, it was held that where

> "within the time prescribed by state statutes an action at law to recover for personal injuries inflicted by a steamship was brought against the owner in a federal court in New York but from various causes not chargeable to the fault of plaintiff the cause was delayed for more than two years, when it was dismissed for want of jurisdiction without prejudice, and a new action in admiralty was commenced at once, the case was so far exceptional that libelant would not be charged with laches to defeat the suit."

In *Fill v. Cunard S. S. Co.*, 217 Fed. 84, it was held a suit against a steamship company for personal injury was not barred by laches where a prior action at law was dismissed for want of jurisdiction, and other causes beyond libelant's control also contributed to the delay.

Substitution of parties permissible.

Some claim is made in the brief of appellants herein that the statute of limitations should run

as to the administrator's appointment and commencement of suit. The substitution, as party plaintiff, of an administrator was not a change in the cause of action.

Missouri, Kansas & Texas R. R. Co. v. Wulf, 226 U. S. 570; 57 L. Ed. 355;

Reardon v. Balakala Cons. Cop. Co., 193 Fed. 189;

Cox v San Joaquin Light & Power Co., 33 Cal. App. 522.

In any event, under Sec. 352 C. C. P. (California), the rights of the five minor children of Souza would be protected, the running of the statute of limitations being stayed during their infancy.

In the case at bar there is disclosed the highest degree of good faith and diligence on the part of the respondent libelant in the prosecution of available remedies, and the courts of admiralty below, both the District Court and the Circuit Court of Appeals, found no difficulty whatever, at any time, in the course of this long litigation, in applying the admiralty rule of grace consistently with the uniform and long-established principles bearing upon this particular point. There being no laches, there being no staleness, there being good faith, there being diligence, and there being no limitation expressed in the state statute conferring the substantive right of recovery, the courts below did not hesitate to do the equity which the whole situation invoked.

It is therefore earnestly and respectfully urged that the writ be denied; that the questions certified be answered as follows:

Number 1. In the affirmative,

Number 2. In the affirmative, and

Number 3. In the negative, and

that the court does not give its attention to the question of the statute of limitations, but, should it see fit to do so, that it affirm the views expressed by both courts below.

Dated, San Francisco,
March 10, 1920.

Respectfully submitted,

CHRISTOPHER M. BRADLEY,
Proctor for Respondent.

HENRY HEIDELBERG,
Of Counsel.